

the original Registrar's order i.e. 24 May 1991 until satisfaction and that the respondent do pay to the appellant costs of this appeal here, but that the costs in the Court below are to be paid by the appellant to the respondent instead.

**a M & J FROZEN FOOD SDN. BHD. &
ANOR.**

v.

SILAND SDN. BHD. & ANOR.

**b SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI HAJI ABDUL
HAMID BIN OMAR LP,
TAN SRI DATUK EDGAR JOSEPH JR. SCJ,
DATUK WIRA WAN YAHYA BIN
PAWAN TEH SCJ
[CRIMINAL APPEAL NO. 02-149-90]
16 DECEMBER 1993**

c

LAND LAW: Sale by public auction - When sale is completed - Whether chargors interest abrogated - Variation of order in the absence of chargor - Whether valid - Non compliance of ss. 258 and 261 NLC - Whether fatal.

d The 1st respondent (chargor) was the registered owner of a piece of land (said property). The said property was at all material times charged to the 2nd appellant (chargee). Due to a default on the part of the chargor, the chargee obtained order for sale and auction. The said property was auctioned on 25 January 1987. The purchaser who was the highest bidder at a price of RM196,000 was duly pronounced the purchaser of the property. He paid RM49,000 being 25% deposit of the total purchase price. However the purchaser did not pay balance within 30 days from the date of sale. In view of this default, the chargor entered a private caveat on the property. The caveat was removed on technical grounds.

f

The purchaser some 4 1/2 months after the expiry of the date for payment of the balance sum filed an application for and obtained an order for the completion date to be extended by 14 days from the date of the order. As only the chargee and not the chargor was made a party in the application, the chargor as an aggrieved and interested party applied for leave to intervene and order in terms of the application was granted. The learned Judge also set aside the previous order wherein he had extended time of completion of purchase. Meanwhile the chargor had commenced an auction for a rescission of the contract and forfeiture of the deposit of RM49,000 paid by the purchaser. Despite all the contentious events and circumstances, the learned SAR accepted the balance sum and proceeded to issued the certificate of sale to the purchaser who intorn

g

h

i

presented the same for registration to the Pengarah Tanah dan Galian, Johore.

The chargor took out summons in chambers for a final judgment to be entered against the purchaser and the chargee. The learned trial Judge *inter alia* declared the RM49,000 deposit forfeited, annulled the certificate of sale and cancelled the registration of transfer in respect of the land.

Held:

[1] It is obvious that at the fall of the auctioneer's hammer, no money has yet changed hands between the parties and neither has any documents been signed. Even if that time is to be liberally construed to include the events transpiring shortly thereafter, the purchaser could only rely on the down payment of 10% of the purchase price and his acceptance of the conditions of sale. The issue of non-payment of the full purchase price alone is sufficient to negate the constitution of any constructive or bare trust and consequently the asserted transfer of the proprietary right from the vendor to the purchaser.

[2] Any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is *ultra vires* the authority to sell under the National Land Code. As the alteration of the completion date was made without giving notice to the chargor, the subsequent order made by the SAR was void as being *ultra vires* the National Land Code.

[3] Failure to comply with the statutory requirements of paragraphs (a) and (b) of s. 258 and paragraph (c) of s. 261(1) of the NLC is not just a case of non compliance with some practical guidelines in the Code - a mere irregularity but it is an illegality which strikes at the root of the proprietor's right to be heard.

[Appeal dismissed].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG TANAH: Jualan melalui lelongan awam - Bila jualan diselesaikan - Sama ada kepentingan penggadai ditolak - Perubahan perintah dalam ketidakhadiran penggadai - Sama ada sah - Ketidakpatuhan ss. 258 dan 261 KTN - Sama ada membawa padah.

Responden pertama (penggadai) ialah tuan punya berdaftar akan sebidang tanah (harta tersebut).

a Harta

tersebut adalah pada setiap masa yang berkenaan digadaikan kepada perayu kedua (pemegang gadaian). Akibat kemungkiran pihak penggadai, pemegang gadaian telah mendapatkan perintah jualan dan lelongan. Harta tersebut digadaikan pada 25 Januari 1987. Pembeli berkenaan yang merupakan penawar-beli yang menyebutkan harga paling tinggi pada RM196,000 telah diisytiharkan sebagai pembeli harta tersebut. Beliau membayar RM49,000 sebagai deposit iaitu 25% daripada jumlah harga belian. Walau bagaimanapun, pembeli tidak membayar bakinya dalam tempoh 30 hari dari tarikh jualan. Berdasarkan kepada kemungkiran ini, penggadai telah memasukkan kaveat persendirian ke atas harta tersebut. Kaveat tersebut telah dikeluarkan atas alasan teknikal.

Kira-kira selepas 4 1/2 bulan selepas tamatnya tarikh bagi pembayaran baki jumlah wang, pembeli telah memfailkan suatu permohonan untuk dan memperolehi perintah bagi tarikh penyelesaian dilanjutkan selama 14 hari dari tarikh perintah tersebut. Memandangkan hanya pemegang gadaian dan bukannya penggadai dijadikan sebagai suatu pihak dalam permohonan berkenaan, penggadai dijadikan sebagai suatu pihak dalam permohonan berkenaan, penggadai sebagai sebuah pihak yang terkilang dan pihak yang mempunyai kepentingan telah memohon untuk kebenaran bagi mencelah dan perintah sebagaimana yang dipohon dalam permohonan tersebut telah diberikan. Hakim yang bijaksana tersebut juga telah mengenyepikan perintah sebelum ini di mana beliau telah melanjutkan tarikh penyelesaian pembelian. Sementara itu, penggadai telah memulakan suatu lelongan untuk penolakan kontrak dan perlucutan hak akan deposit berjumlah RM49,000 yang dibayar oleh pembeli. Walaupun dengan adanya segala keadaan dan peristiwa yang dipertikaikan, PKP telah menerima baki jumlah wang berkenaan dan terus mengeluarkan perakuan jualan kepada pembeli yang mana kemudiannya mengemukakan ia untuk pendaftaran kepada Pengarah Tanah dan Galian, Johor.

Penggadai mengeluarkan saman dalam kamar untuk penghakiman muktamad dicatatkan terhadap pembeli dan pemegang gadaian. Hakim perbicaraan antara lain mengisytiharkan deposit berjumlah RM49,000 sebagai dilucut hak, m e m b a t a l k a n p e r a k u a n

i

jualan dan membatalkan pendaftaran pindah milik berhubung dengan tanah tersebut.

Diputuskan:

[1] Adalah jelas bahawa pada ketukan tukul pelelong, tiada wang yang bertukar tangan di antara pihak-pihak berkenaan dan juga tiada sebarang dokumen yang ditandatangani. Walaupun jika bahawa masa ditakrifkan secara liberal bagi menyertakan perkara-perkara yang berlaku sejurus selepas itu, pembeli hanya dapat bergantung kepada bayaran muka sebanyak 10% daripada harga pembelian dan penerimaan syarat-syarat jualan olehnya. Isu tidak menjelaskan bayaran penuh akan harga pembelian itu sahaja sudah cukup untuk membatalkan pembentukan sebarang 'bare trust' atau konstruktif dan berikutnya pengesahan pindahmilik hak keempunyaan daripada penjual kepada pembeli.

[2] Sebarang perubahan akan perintah jualan atau terma-terma dan syarat-syarat yang dibuat di bawahnya itu dalam ketidakhadiran dan tanpa penyampaian notis yang dikehendaki kepada penggadai adalah *ultra vires* kuasa untuk menjual di bawah Kanun Tanah Negara. Oleh kerana perubahan tarikh penyelesaian dibuat tanpa pemberian notis kepada penggadai, perintah berikutnya yang dibuat oleh PKP adalah terbatal kerana merupakan *ultra vires* Kanun Tanah Negara.

[3] Kegagalan untuk mematuhi kehendak-kehendak statutori akan perenggan-perenggan (a) dan (b) s. 258 dan perenggan (c) s. 261(1) KTN bukan sahaja merupakan suatu kes ketidakpatuhan beberapa garis panduan praktikal dalam Kanun tersebut - suatu yang di luar aturan semata-mata - tetapi ia merupakan suatu kepenyalahan yang memyergah hak plaintif untuk didengar.

[Rayuan ditolak].

Cases referred to:

Foster (John) & Sons v. Inland Revenue Commission [1894] 1 QB 516 (cit)
Taylor v. Land Mortgage Bank of Victoria [1886] 12 VLR 748 (cit)
Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors. [1974] 2 MLJ 45 (cit)
Aberfoyle Plantations Ltd. v. Khaw Bian Cheng [1960] MLJ 47 (cit)
Chang v. Registrar of Titles [1976] ALJR 404 (cit)

- a *Peninsular Land Development v. Ahmad* [1970] 1 MLJ 149 (cit)
Official Assignee v. Johnston [1975-77] ALR 285 (cit)
Karupiah Chettiar v. Subramaniam [1971] 2 MLJ 116 (foll)
Malayan United Finance Bhd. v. Liew Yet Lan [1990] 1 MLJ 317 (not foll)
- b *Mahadevan s/o Mahalingam v. Manilal & Sons (M) Sdn. Bhd.* [1984] 1 CLJ 286 (cit)
Development & Commercial Bank Bhd. J.B. v. Kim Ming Choon [1991] 1 CLJ 732 (cit)
Kuala Lumpur Finance Bhd. v. Yap Poh Khian [1991] 3 CLJ 1805 / [1992] 1 MLJ 472 (cit)
Public Bank Bhd. v. Phan Seng Kee & 2 Ors. [1991] 3 CLJ 2560 (cit)
- c *Malayan United Finance Bhd. v. Tan Lay Soon* [1991] 2 CLJ 899 / [1991] 1 MLJ 504 (foll)
Gibbs v. Messer [1891] AC 248 (cit)
United Malayan Banking Corporation Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd. [1988] 1 CLJ 577 / [1988] 3 MLJ (foll)
- d *Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 7 (cit)
Forsyth & Anor. v. Bundell & Anor. [1972-73] 129 CLR 477 (cit)

Legislation referred to:

Auction Sales Enactment, Johore, s. 11
 National Land Code 1965, ss. 120, 243, 244(1), 249(1), 256(2), 257, 258(1)(a), (2), 259(a), (2), (3), 260, 261(1)(c), 266(1), 267(1)(a), 340(2)(b), (c), (3), 417, cl. 3(ii)
 Rules of the High Court 1980, O. 83

Other sources referred to:

The Province of the Law of Tort, Winfield, (1931 Edn.)

- f *For the 1st appellant - Sri Ram; M/s. Sri Ram & Co.*
For the 1st respondent - Wong Kim Fatt; M/s. Gulam & Wong

JUDGMENT

Wan Yahya bin Pawan Teh SCJ:

- g In the High Court in Muar, the 1st respondent, Siland Sendirian Berhad (hereinafter referred as 'the chargor') successfully applied for and obtained a decree annulling the earlier order for sale made by the SAR, forfeiture of the deposit and other consequential reliefs in respect of an auction sale of its land initiated by the 2nd respondent, Eu Finance Berhad (the chargee). The present appeal against the High Court's decision was brought by the 1st appellant, M & J Frozen Food Sdn. Bhd. (the purchaser). The 2nd respondent, Mohd Kepol bin Bidin (the auctioneer) had since passed away and the chargee, perhaps on realising that his redemptive objective would be better served by the High Court's judgment, elected to abandon the appeal.

i

To ensure a prescriptive appreciation of this case some antecedent events leading to the present appeal are set out in detail: Siland, the chargor at the commencement of the suit at Muar, was the registered owner of all that piece of land held under H.S. (D) 40269, Lot No. PTD 18279, in the Mukim of Plentong, in the District of Johor Bahru, the subject matter of these proceedings (the said property).

The said property was at all material times charged by the chargor to Eu Finance Berhad, a licensed finance company incorporated in Malaysia (the chargee).

On 6 May 1985 due to a default on the part of the chargor, the chargee applied for an order for sale of the said property by public auction *vide* Johor Bahru High Court Originating Summons No. 180/1985 and the order was made by Mahadev Shankar J. of the High Court at Johor Bahru on 10 March 1986.

Pursuant to the abovementioned order, the acutioneer, a licensed auctioneer and appraiser (now deceased), was appointed by the Court to conduct the sale of the said property by public auction and such auction was conducted on 25 January 1987.

Apparently, sales of land by public auction by the Court in Johor State has always been conducted subject to proclamation of sale holding conditions derived from two separate documents, one known as the "Johor Conditions of Sale" and the other "Special Conditions of Sale". The proclamation which provides that the property be sold subject to both conditions, has the special condition annexed to it but any intending bidder has to inspect the Johor condition of sale which was available at the auctioneer's office.

Both conditions deal with matters pertaining to the conduct of public sales such as the description of property, the procedure of bidding, the requisition and the completion date. The Johor conditions of sale appear to be general in form whereas the special conditions contain some specific conditions of sales.

Now, reverting to the events at the auction sales, the purchaser who was the highest bidder at a price of RM196,000 was duly pronounced the purchaser of the property. He paid RM49,000 being 25% deposit of the total purchase price as provided under clause 6 of the special conditions of sale and clause 2 of the Johor conditions of sale and the money was accord-

a ingly paid into Court. According to clause 7 of both Conditions, the balance of the purchase money amounting to RM147,000 was to be paid into Court within 30 days from the date of sale. As the auction had taken place on 25 January 1987 such payment should have been paid by 24 February 1987. However this was not done.

b In view of this default, the chargor entered a private caveat on the property on 9 April 1987. In addition he also wrote to the Senior Assistant Registrar (SAR) drawing her attention to the default by the purchaser in completing the purchase of the property within the stipulated time and informing her that he had on 24 February 1987 entered a caveat on the said property. *c* We were given to understand that on 22 September 1988 the caveat was removed by L.C. Vohrah J. on what the purchaser's Counsel termed as technical grounds.

d On 15 July 1987 after the filing of the summons in chambers but before the removal of the caveat and some 4½ months after the expiry of the date for the payment of the balance sum, the purchaser by an originating summons filed in the same Court applied for and obtained an order for the completion date to be extended to 29 July 1987 (i.e. 14 days from the date on the order). As only the chargee and not the chargor *e* was made a party in the application, the chargor as an aggrieved and interested party applied on 8 October 1987 for leave to intervene, and, an order in terms of that application was subsequently made by Vohrah J. on 21 February 1988. In that order the learned Judge also set aside the previous order wherein he had extended time of completion to 29 July 1987. *f* No appeal was filed in respect of the subsequent order.

g It is pertinent to note that at all material times, the chargor had objected to the issue of the certificate of sale to the purchaser on account of the purchaser's breach of condition to pay the balance of the purchase price within the stipulated time. In fact on 10 August 1987, even before the purchaser could pay the balance of the purchase price, the chargor had commenced an action for a rescission of the contract and forfeiture of the deposit of RM49,000 paid by the purchaser.

h However, two days after the order made by Vohrah J. on 21 February 1988 (setting aside his previous order of extension), and 6 months after the chargor's action to rescind and forfeit and one year after the completion

i

date, the purchaser forwarded the balance sum of RM147,000 to the Senior Assistant Registrar. Despite all the contentious events and circumstances, the learned SAR accepted the balance sum and proceeded to issue the certificate of sale to the purchaser. On 18 October 1988 the purchaser presented the certificate of sale for registration to the Pengarah Tanah dan Galian Johor.

The chargor subsequently took out summons in chamber for a final judgment to be entered against the purchaser and the chargee, in turn, applied for the chargor's action to be struck out. Both summons were heard simultaneously by Richard Tallala J. on 25 June 1989 and at the conclusion of which on 25 February 1990 he declared the RM49,000 deposit forfeited, annulled the certificate of sale issued by the SAR on 29 September 1988 and cancelled the registration of transfer in respect of the same land. The learned Judge also made orders for the return of the issue document of title and ordered the property to be resold.

Before this Court, both Counsel who argued the appeal with professional perspicuity, agreed that the issues be confined to the following:

- (i) Whether in a sale of land in a public auction, the sale is completed at the fall of the auctioneer's hammer.
- (ii) Whether the Court has the power to extend time for a defaulting purchaser to complete the sale and purchase agreement after the agreed date of completion had passed.
- (iii) Whether in the event of a negative answer to either circumstances above, the High Court is empowered to make the order as it did.

It was contended on behalf of the appellant that the learned Judge at Muar could not have made the order as he did because at the fall of the auctioneer's hammer in a public auction, the sale is completed and whatever proprietary rights which belonged to the chargor had come to an end. In support of this argument the learned Counsel for the appellant referred to s. 259(2); s. 266 of the National Land Code and s. 11 of the Auction Sales Enactment - Johore [10 of 1932]. These sections are reproduced below for easy reference.

Section 259(2)

The officer under whose direction the sale takes place shall -

- (a) receive the bids (including any bid by or on behalf of the chargee);

a

b

c

d

e

f

g

h

i

- (b) settle summarily any question arising in the course of the proceedings;
- (c) in the absence of any bid at or above the reserve price, withdraw the land or lease in question from the sale, direct that it be put up for auction on a subsequent date, either at the same or at a reduced reserve price, and see that the subsequent sale is publicly advertised in the like manner; and
- (d) subject to paragraph (c), **declare the sale concluded** in favour of the highest bidder.

Section 266

- (1) Any chargor against whom an order for sale has been made under this Chapter may, at any time before the **conclusion of the sale**, tender the amounts specified in sub-section (2) to the Registrar of Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect.

Section 11 of Auction Sales Enactment - Johore [10 of 1932].

A sale by public **auction** shall be complete when the auctioneer announces its completion by the **fall of the hammer** or other customary manner, and, until then, any bidder may retract his bid. At the time of announcing such completion the auctioneer shall forthwith audibly declare the name of the actual purchaser. (my emphasis for prominence).

It is pertinent to note that the terms 'sale concluded', 'conclusion of sale' and 'sale completed' as used respectively in the three above-written sections are merely employed to signify that point of time when there has been an acceptance of the bid in accordance with the sale and purchase agreement or sometimes referred to as the conditions of sale. The sale at this juncture has only been concluded in the sense that the goods will no longer be offered for sale to prospective buyer and the successful bidder cannot be permitted to retract his acceptance.

Thereafter each party to the contract of sale must perform his part of the obligation and until then no executed or actual sale has been concluded.

Even in the context of sales of goods, a sale is concluded only when there is a transfer of property from one person to another for money or other consideration. In *Foster (John) & Sons*

v. *Inland Revenue Commission* [1894] 1 QB 516 at 528 CA Lindley LJ said:

I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money ...

So a reference to a sale being concluded at the fall of the auctioneer's hammer could only refer to that stage of the transaction of sale when there is concluded an agreement between the vendor and the highest bidder, the former to sell and the latter to purchase the goods. Hence the term 'conclusion' in the context of these sections can only mean conclusion of certain aspect of the sale when there is an agreement between the parties to sell and buy the property but the proprietary right has yet to be conveyed from the vendor to the purchaser.

In contrast to the sales of goods, the sale of land involves a more complex procedure which presents many special characteristics. Winfield, in his book, **The Province of the Law of Tort** (1931 Edn.) refers to a contract of sale of land as a "contract conveyance" while R.G. Rowley, in 18 Conv. and PL at p. 302, described it as "hybrid creature, born out of an uneasy marriage of the law of property and the law of contract, and doubtful to which parent they owe their primary allegiance". Perhaps it would suffice for our present purpose to say that the general law of contract will initially apply in any sale of land. Thereafter many rights and obligations which are incidental to the property will arise. An auction to sell land will necessarily involve the elements of contract when the bid is accepted and subsequently conveyance when the land is transferred to the buyer.

To answer the point raised by Counsel for the appellant, the issue on the transfer of proprietary right at the fall of the hammer, it is imperative that we take a brief look at the incidents affecting the transfer of land after a contract had been concluded between the parties.

In a sale of land under the Torrens system, the estate and interest in the land remained with the proprietor until he has done all that is necessary to divest the estate out of himself and vest it in the transferee - See *Taylor v. Land Mortgage Bank of Victoria* [1886] 12 VLR 748. This principle is embodied in s. 267(1)(a) of our National Land Code (NLC) which reads:

Any certificate of sale given to a purchaser under sub-section (3) of s. 259 or sub-section

a (4) of s. 265 in respect of any charged land or lease shall be treated for all the purposes of this Act as an instrument of dealing, and shall be registrable accordingly under Part Eighteen; and upon the registration thereof -

b (a) the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge in question and any charge subsequent thereto;

To put it shortly, completion under the Torrens System refers to that stage of the conveyance when the land is registered with the Registrar of Titles.

c The position under our case law is however a little less demanding. According to the authorities, on the execution of the contract payment of the full purchase price and the delivery of the document of Title, the vendor becomes a constructive trustee for the purchaser and the latter acquires an equitable right on the land.

d In *Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors.* [1974] 2 MLJ 45, Ong Hock Sin FJ after consulting various English Authorities expressed the Court's judgment in the following terms:

e The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

f In the same case Gill FJ expressed the opinion that the vendor became a constructive trustee when the full purchase money had been paid and the purchaser has received the instruments of transfer and the title deeds.

g In *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] MLJ 47 the Privy Council observed that the vendor became a 'bare trustee' on payment of the purchase money. Similarly in *Chang v. Registrar of Titles* [1976] ALJR 404, it was held that the vendor has no right of his own and becomes a holder of the legal estate on payment of the purchase money.

h Although the authorities seem to differ on the level of transaction at which the bare or constructive trusteeship would arise the rationale are unanimous on one issue i.e. such trusteeship can only arise on payment of the balance of the purchase price or on payment of the full

i

purchase price. In *Peninsular Land Development v. Ahmad* [1970] 1 MLJ 149 Suffian FJ (as he then was) said that the beneficial ownership passes to the purchaser as soon as the purchase price has been paid. So was it held in a New Zealand case of *Official Assignee v. Johnston* [1975-77] ALR 285 where the Court held that the purchaser only became owner of the land subject to his obligation to pay the purchase price.

It would appear from the above-cited cases that the vendor is regarded as having divested himself of all the beneficial interest in his land and vested it on the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full - see *Karupiah Chettiar v. Subramaniam* [1971] 2 MLJ 116 at 119.

Applying these rationale to the facts of our present appeal, it is obvious that at the fall of the auctioneer's hammer, no money has yet changed hands between the parties and neither has any documents been signed. Even if that time is to be liberally construed to include the events transpiring shortly thereafter, the purchaser could only rely on the down payment of 25% of the purchase price and his acceptance of the conditions of sale. The issue of non-payment of the full purchase price alone is sufficient to negate the constitution of any constructive or bare trust and consequently the asserted transfer of the proprietary right from the vendor to the purchaser.

The High Court's decision in *Malayan United Finance Bhd. v. Liew Yet Lan* [1990] 1 MLJ 317 was cited in argument in this Court and the Court below as tending to support the appellant's contention on this particular issue. In the course of that part of his judgment dealing with the chargee whom he said should be regarded as a vendor, V.C. George J. went on to say

I think I should and I do lay down that the defaulting chargor abdicates his right as registered owner of the land *vis-a-vis* selling it in favour of the chargee.

We do not think that the above expression is intended to lay down the law that in a sale under s. 256 of the National Land Code, the chargor renounces or surrenders all his proprietary rights in favour of the chargee, neither do we contemplate any transfer of such proprietary rights from the chargor to the chargee. The

- a** Court makes an order for sale at the request of the chargee after the chargor had failed to satisfy the Court of the existence of a cause to the contrary. The order provides for certain conditions and procedures to be followed at the sale. The chargee's participation in this instance is only confined to the preparation of the conditions of sale in term of the order and the production in Court of the issue documents of title - see s. 258(2) of the National Land Code. On the other hand, the chargor is prevented by the Court's order from denying the chargee's statutory's right of sale, but he may nevertheless exercise his right as a proprietor to dispute any impropriety or anything done in breach of the statutory conditions of sale. In any event s. 267(1)(a) of the National Land Code, which provides that the passing of the interest in the proprietary right from the chargor to the purchaser would occur on registration and after the issuance of a certificate given under s. 259(a), clearly negates any such judicial proposition that the chargor abdicates his proprietary rights at that stage of the auction sales.
- b**
- c**
- d**

The legal position between the chargor and the chargee had been briefly referred to in the Federal Court case of *Mahadevan s/o Mahalingam v. Manilal & Sons (M) Sdn. Bhd.* [1984] 1 CLJ 286 at 289 as follows:

- e** Our land law does not recognise a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, i.e. ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognises a mortgagor in the sense of Torrens system, referred to by text written as Torrens Mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security.
- f**
- g**

The passage from George J's judgment in *United Finance*'s case appears to have been overstretched beyond the efficacy of its esthetic language.

The second issue raised in this appeal i.e. on the power of the SAR to extend time in favour of a defaulting purchaser, has been dealt with in several High Court judgments other than the present judgment on appeal. However the circumstances affecting these cases differ slightly from case to case. *Malayan United Finance v. Liew Yet Lan (supra)* is an application by a

i

chargee against the order made by the SAR extending time in favour of a defaulting purchaser. In that case, George J. held that the chargee is to be regarded as a vendor and the condition of sale as the sales and purchase agreement. However the learned Judge went on to hold that where either the conditions of sale or the NLC contain no provisions empowering alterations to be made to the conditions, then the Registrar shall have no power to alter the original date specified in such conditions so as to extend time of completion. It is not mentioned and we can only assume that the chargor was not made a party to the proceedings.

Barely a year after that in the same Court in Johor Baru, a decision on a somewhat similar subject was made in *Development & Commercial Bank Bhd J.B. v. Kim Ming Choon* [1991] 1 CLJ 732. In that case an application to extend time to pay the balance of the purchase money was made *ex parte* before the SAR by the purchaser. Neither the chargee nor the chargor were notified of the application. James Foong JC (as he then was) in applying the rationale of *Malayan United Finance Bhd's* case (*supra*) that the chargor 'abrogates' his rights to the chargee, went on to say that the chargor's rights are restored once the sale is aborted. The learned JC agreed with the *Siland's* case (the present case on appeal) and proceeded to express his view that the SAR has no power to vary the order for sale issued by a Judge. Any variation of such order must be heard before a Judge. On the issue of indefeasibility the learned JC held that the protection under s. 340 of the NLC can be removed through an order under s. 417 of that Code.

The third case in sequence to the dates of judgments is *Kuala Lumpur Finance Bhd. v. Yap Poh Khian* [1992] 1 MLJ 472. In that case, Lim Beng Choon J. whilst adopting the proposition of the chargor abdicating his rights to the chargee, as laid down in *Malayan United Finance's* case, proceeded to explain:

But this general proposition does not mean that if an auction sale has been conducted fraudulently, collusively or otherwise improperly to the prejudice of the chargor, he cannot intervene to set aside the sale whether or not the purchaser is privy to it. The effect of setting aside the sale is to restore the chargor's right of discharge or under English common law mortgage, the equity of redemption.

a The learned Judge then noted that the sale of charged land may be set aside not only in cases involving corrupting collusion or fraud but also in cases where the sale is tainted with impropriety. On the issue of extension of time to the defaulting purchaser, he held that the SAR had no right to do so without the consent of the chargee. It would appear from this judgment that the learned Judge recognised the chargor's right to set aside the sale in case of fraud, collusion or impropriety although he is not a party to the sale and purchase transaction.

b The most recent case on this subject is reported in *Public Bank Bhd. v. Phan Seng Kee & 2 Ors.* [1991] 3 CLJ 2560. Peh Swee Chin J. (as he then was) expressed the position of the chargee as follows:

In my view, the chargee had a statutory right of sale subject to judicial leave. Please see *Suppiah v. Ponnampalam* [1963] MLJ 202. The chargee must be regarded as a vendor, please see *Lim Beng v. AVA* [1922] 1 FMSLR 264; *Malayan United Finance Bhd. Johore Baru v. Liew Yit Lan* [1990] 1 MLJ 317; *Siland Sdn. Bhd. v. M & J Frozen Food Sdn. Bhd.* [1990] 2 MLJ 503. The auction being a judicial sale would be under discretion of the Court, and also would be under such direction, in any event, by s. 257 of the National Land Code.

d The learned Judge held that with the chargee assuming the place of the vendor and the purchaser as the successful bidder, they were in a position, as two contracting parties, to alter the contract of sale i.e. with the approval of the Court. In doing so, the Court has to consider the interest of the chargor.

f Three subsidiary issues arise from this power to extend time. Firstly is the chargor a necessary party to this application for extension of time before the SAR or the Judge. Secondly, is his consent or his interest relevant towards considering that application. Thirdly, can the SAR or Judge vary the condition of sale in the absence of and/or without the consent of the chargor.

g V.C. George J. is of the view that such variation cannot be done without the consent, and impliedly, in the absence of the chargee. He was silent on the rights of the chargor probably for reason of his earlier finding that the chargor had abdicated his rights to the chargee. James Foong JC however held that although the chargor has abrogated his rights to the chargee, the former's rights are restored by the chargee's breach of the

i

conditions of sale. Although the learned JC commented on the chargor's rights being completely ignored, he made no finding on the issue. Likewise, Lim Beng Choon J. in holding that the chargor can intervene to set aside an improper sale, made no mention as to whether the SAR's failure to include the chargor at the hearing of the application to extend time is tantamount to a denial of the chargor's right or an act of impropriety. Peh Swee Chin J. while holding that the chargee and purchaser possess the right to alter the condition of sale, they must in seeking the approval of the Court notify and hear the chargor. He appears to be of the view that once this has been complied with, and the Court has considered the chargor's interest, his consent is immaterial. In *Siland's* case (present case on appeal) Richard Tallala JC (as he then was) held that an extension of time without reference to the chargor is an abrogation of the chargor's right.

Be it so, one common principle of law emerges from these judgments and that is the chargor's proprietary right **is not** entirely extinguished and so he is entitled to make an application to set aside an improper sale. We are not prepared to construe that a chargor is divested of his proprietary rights at the fall of the hammer nor are we disposed to interpret the complete surrender of his rights to the chargee at the making of the order of sale so as to deprive him of the rights to challenge the propriety of the sale. As mentioned earlier, the divesting of the chargor's right occurs only on completion of the contract of sale and conveyance when the chargor becomes a constructive trustee for the purchaser.

In the *Malayan United Finance Bhd v. Tan Lay Soon* [1991] 1 MLJ 504 Jemuri Serjan SCJ, sitting in another panel of this Court elucidated the respective interests of the chargor and the chargee in respect of a charged land as follows:

Under the National Land Code the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it tenders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s. 243). Under s. 244(1), the chargee is entitled to the custody of the issue document of title so long the liability stays under the charge. There is no statutory provision for the discharge of the charge by the chargor but his right and that of a borrower to do so is embodied in the provisions of the charge

itself. See cl. 3(ii) of the annexure of the charge and s. 249(1) of the National Land Code. However, under s. 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the Registrar of the Court or the Collector and the amount sufficient to cover all expenses in connection with the judicial sale. Since the right or interests in the charged land remains with the registered owner he has nothing to redeem."...

The chargor does not abrogate all his rights to the chargee at the making of the order for sale. He is merely compelled to abide by the Court's order for his property to be sold in accordance with the statutory safeguards on his interest as provided under ss. 257 & 258 of the NLC. He is a necessary party to the application for sale and must be served with summons or writ in the manner provided under O. 83 of the Rules of High Court in respect of an application under s. 256, and, with summons as provided under s. 261(1)(c) of the NLC in respect of an application under s. 260 of the NLC. Even after the order of sale has been made and when the auction sale was already in progress, but before a bid has been accepted, he still retains the right to tender payment of the amount which he owed the chargee (which may be less than the value of the land on sale) and call off the sale - s. 266 NLC. The exercise of such rights do not appear to us to be consistent with a proprietor who has surrendered absolutely his rights over the land to another.

The order for sale confers on the chargee, only the statutory rights to a judicial sale. A sale under s. 256 or s. 260 of the NLC is a judicial sale ordered by Court on the application of the chargee. The chargor, who has until that stage not been divested of his proprietary rights may intervene to set aside the sale in the event of fraud, impropriety or the breach of any statutory or contractual terms of the sale. We agree that the terms or conditions of sale may be varied, if having regard regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the Court after giving the chargor the right to be heard. As the Court's power to order the sale including the authority to fix the price and condition of sale is derived from the statutory provision of the NLC after giving the chargor the right to be heard, it is manifest that any alteration to the term of condition must likewise be exercised.

We consider any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is *ultra vires* the authority to sell under the National Land Code. Therefore we would, in answer to the second issue raised, say that as the alteration of the completion date was made without giving notice to the chargor, the subsequent order made by the SAR was void as being *ultra vires* the National Land Code.

The last issue is basically on the authority of the Court to cancel the name of the purchaser which had by then become indefeasible by subsequent registration. The registration under Chapter 4 of Part XVIII of the NLC does not necessarily make the title of the land entirely unimpeachable. Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule, is that no person can give a better title than he had - *nemo dat quod non habet*. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s. 340(3) of our National Land Code 1965 where a *bona fide* purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility, - see *Gibbs v. Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.

It would appear, however, from the facts in this appeal that the challenge on the indefeasibility of the purchaser's interest could appropriately be dealt with under paragraph (b) and (c) of s. 340(2) of the NLC.

a In *United Malayan Banking Corporation Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd.* [1988] 3 MLJ, Edgar Joseph Jr. J. (as he then was) when dealing with the effect of registration obtained by means of a void and insufficient instrument, said:

b In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s. 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s. 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted *ultra vires* the powers conferred upon him: s. 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute: *Jagabandhu v. Radha Krishna*, particularly when as here, the non-compliance goes to the root of the thing. In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be *ultra vires* and no person can be estopped from putting forward the contention that what was done was illegal or void: *University of Delhi v. Ashak Kumar Chopra*.

c In *Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 7, Ajaib Singh J. (as he then was) held that a registration after the approval of alienation had lapsed, was made *ultra vires* the NLC. In the course of his judgment, the learned Judge said:

d I held that in the present case the alienation of the land under qualified title to the respondent did not involve a mere irregularity or non-compliance with the statutory procedure relating to the method of acquiring alienation of qualified title but that the state authority had acted *ultra vires* the National Land Code and therefore the alienation of the land under qualified title was illegal and a nullity. Consequently, the conclusiveness of title and the indefeasibility provisions in the Code were rendered irrelevant and inapplicable. In the event, I held that when she instituted proceedings against the appellant the respondent had no *locus standi* in the matter as she was not a lawfully registered proprietor of the land. I accordingly allowed the appeal with costs.

e We agree with what was stated in the judgments above. In our present appeal, failure to comply with the statutory requirements of paragraphs (a) and (b) of s. 258 and paragraph (c) of

f

g

h

i

s. 261(1) of the NLC is not just a case of non compliance with some practical guidelines in the Code - a mere irregularity - but it is an illegality which strikes at the root of the proprietor's right to be heard.

Sub section (2) of s. 258 states that a chargee on whose application the order was made shall prepare the conditions of sale, **in accordance with the terms of the order** and any determination thereunder by the Registrar of the Court. In our present appeal, the effects of extending the time of payment is to cause a material change in the condition of sale and thus render it no longer in accordance or within the terms of the original order and determination made by the Registrar. Consequently the amended conditions of sale bearing some different terms or directions from the original conditions has to be served again in accordance with s. 258(1)(a) of the NLC on the chargor. Failure to do so is a clear transgression of the statutory provisions of that section. Moreover the *ex parte* hearing of the originating summons on the application to extend time, without service to the chargor, is perceptibly not in accordance with the law relating to civil procedure - (see s. 256(2) NLC).

Under ss. 258 & 261 the chargor is not only given the opportunity to show cause as to why his property should not be sold but also to participate in the deliberation on matters affecting his interest, such as the reserve price, the time, venue and conditions of sale. Over and above this, the SAR appears to have completely ignored the subsequent order setting aside the date of extension as well as the various contentious applications, objections and dissentious communications between the parties. The purchaser, on the other hand, inspite of his awareness of the contentious situation and the subsequent order setting aside the extension date, unheedingly went on to apply and obtain the certificate under s. 259(3) of the NLC and subsequently to register the property.

We are unable to say whether this *faux pas* was tainted with *mala fides* and so describe it as a fraud but we would certainly conclude this conduct as being a serious impropriety or in the words of Walsh J. in the Australia's High Court case of *Forsyth & Anor v. Bundell & Anor*. [1972-73] 129 CLR 477:

conduct which amounts to a reckless sacrificing of the interest of the mortgagor.

a In any event, we are satisfied that the certificate issued by the SAR was *ultra vires* the statutory provision of the NLC and the title was unlawfully acquired by the purchaser. This finding by itself would have rendered the title of the purchaser defeasible under para (c) of s. 340(2) of the National Land Code and under such circumstances the learned Judge had arrived at a correct decision when he made the order.

b We therefore dismiss this appeal and confirm the order of the High Court. The appellant shall pay the costs here and in the Court below. Deposit is to be paid to respondent to account of taxed costs.

c

d

e

f

g

h

i